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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EDWARD V. RAY, JR. et al., Defendants and Appellants.	A117630 (Alameda County Super. Ct. No. C153993)

Appellant Edward V. Ray, Jr. (Ray Jr.), and his son, appellant Edward V. Ray III (Ray III) were jointly charged with commission of a series of commercial robberies.[1] An amended information filed on January 16, 2007, alleged that Ray III committed 31 counts of second degree robbery (Pen. Code, § 211),[2] one count of attempted robbery (§§ 664, 211), and one count of assault with a deadly weapon (§ 245, subd. (a)(1)). It was further alleged that Ray III was armed with a firearm during eight of these offenses (§ 12022, subd. (a)(1)) and that he used a deadly weapon (a knife and a crowbar) in the commission of another (§ 12022, subd. (b)(1)). Ray Jr. was charged with 23 counts of second degree robbery (§ 211). Ray Jr. was alleged to have: personally used a firearm in the commission of four of the robberies (§§ 12022.5; 12022.53, subd. (b)); used a deadly weapon, a knife, during the commission of one (§ 12022, subd. (b)(1)); been armed with

[1] Ray Jr.'s daughter, Melissa Ray (Melissa) and her boyfriend Larry Jamale Carrington (Carrington) were also alleged to have participated in certain of these offenses.

[2] All further code references are to the Penal Code unless otherwise indicated.

a firearm in the course of four offenses (§ 12022, subd. (a)(1)); and inflicted great bodily injury in two instances (§ 12022.7).

Two charged counts against Ray Jr. and Ray III (counts 10 and 21) were dismissed by the court on motion of the District Attorney at the close of the prosecution evidence (§ 1118.1). Additionally, the enhancement for use of a deadly weapon by Ray Jr. on count 25 was dismissed. On March 20, 2007, a jury convicted Ray Jr. on all remaining charged counts, and found all remaining enhancements alleged to be true. The jury found Ray III guilty of all remaining charged robbery counts, and found all enhancements alleged to be true. On the charge of assault with a deadly weapon, the jury found Ray III guilty of the lesser included offense of simple assault (§ 240).

Ray Jr. was sentenced to an aggregate term of 38 years 4 months in state prison. Ray III was referred to the juvenile court for a fitness hearing as to counts 2 and 3, since he was 17 years old at the time of those offenses. (Welf. & Inst. Code, § 604.) After return from the juvenile court, and after receipt of a diagnostic report from the Department of Corrections (§ 1203.03), Ray III was sentenced to a prison term of eight years.

Ray Jr. appeals his conviction, alleging error in: (1) insufficient evidence to support his conviction on the robberies charged in counts 2, 3, 8, 9, 15, 18, 19, 20, 22 and 25; (2) permitting a former codefendant Carrington to identify him on surveillance tapes from certain robberies; (3) admission of the redacted confession of Ray III in their joint trial; (4) improper instructions as to accomplice testimony, and as to cross-admissibility of evidence on the multiple charged offenses; and (5) improper impeachment of Ray Jr.'s trial testimony.[3] Ray III's appeal challenges: (1) the admissibility of his post-arrest statements to police; (2) the court's instructions to the jury on cross-admissibility of evidence on the multiple charged offenses; and (3) the effectiveness of his trial counsel.

[3] Ray Jr. alleges, among other things, ineffective assistance of counsel in a concurrent petition for writ of habeas corpus. We have denied that petition by separate order filed this date. (*In re Ray* (order issued Nov. 23, 2009, A118556).)

We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In summarizing the relevant facts, "we state the evidence in the light most favorable to the judgment below. [Citation.]" (*In re Jesus O.* (2007) 40 Cal.4th 859, 861.) Although we do not limit our review to the evidence favorable to respondent (*People v. Johnson* (1980) 26 Cal.3d 557, 577), "we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence" (*People v. Jones* (1990) 51 Cal.3d 294, 314).

Between July 12, 2005, and August 27, 2006, the Ray family (immediate and extended) engaged in a prolific and profitable enterprise robbing a variety of establishments, primarily convenience stores, in Oakland, Alameda, and Hayward. Their entrepreneurial effort came to an abrupt halt on August 27, 2006, when both Ray Jr. and Ray III were apprehended fleeing the scene of what proved to be their last robbery—a 7-Eleven store at 2411 MacArthur Boulevard in Oakland. The operation further unraveled when Ray III, in an apparent lack of filial devotion, gave a detailed statement to the police chronicling the family exploits and the role of his father, his sister Melissa, and her boyfriend Carrington in the various robberies.[4] Finally, Carrington accepted a plea bargain and testified against both Ray Jr. and Ray III at trial.[5] The offenses, and the evidence relating to each count, are outlined here in chronological order.

Counts 2 and 3 – Robberies of Allen Kung and Christina Miller at Longs Drugs in Oakland on July 12, 2005 [Ray Jr. and Ray III]

The first chapter in this crime spree began on July 12, 2005, at a Longs Drugs located at 51st Street and Broadway in Oakland (counts 2 & 3). Allen Kung was the manager of the store and Christina Miller was a cashier. At about 11:50 p.m., three

[4] As discussed in greater detail *post*, Ray Jr. later demonstrated his paternal instincts by seeking to have Ray III take responsibility for the offenses and thereby exonerate Ray Jr.

[5] The record before us does not reflect the disposition of the charges against Melissa. She was apparently out of custody and living in Pennsylvania at the time of trial.

persons entered the store, wearing masks and gloves.[6] Kung described one individual as about six feet tall and skinny—about 150 pounds, wearing a grey hooded sweater. Kung could tell by the individual's voice that he was a man, and he could see through the openings in the mask that the man was Caucasian. The second person was about five feet five inches tall, and wearing all black (Ray Jr. is approximately five feet nine inches or five feet ten inches tall). Kung believed from the person's voice that the second individual also was male. The shorter robber carried a nine-millimeter handgun.

The taller robber pointed a gun at Christina Miller, demanding that she open the safe or he would kill her. He ordered Kung to open the safe and also what the robber referred to as the "Reno Box." The "Reno box" was a box into which cashiers would deposit large denomination currency. Store cashiers were familiar with this term.[7] Kung removed the money from the "Reno box," from the change box, and from the safe, dropping it into a duffel bag held by the shorter robber. Kung estimated the loss at $50,000.[8]

The robbery was captured on surveillance video. In his post-arrest statement, Ray III stated that he had committed this robbery (as well as one other uncharged offense) with "Ozell," a friend whose last name he did not know.[9]

Count 4 – Robbery of Jimmie Ngo at Longs Drugs in Oakland on November 21, 2005 [Ray III, Carrington and Melissa]

Alan Kung was again working as the night manager at Longs Drugs when it was robbed for the second time on November 21, 2005, at about 11:50 p.m. Jimmy Ngo was another manager on duty. Three or possibly four robbers entered the store and forced

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[6] Kung was equivocal on the number of robbers. On direct examination he stated that there were three. On cross-examination he indicated that there were four robbers. He told police on the night of the robbery that there were three. The store surveillance video showed at least two, and possibly three, individuals involved.

[7] Melissa Ray worked as a cashier at this store, but she did not show up for work near the time of the robbery.

[8] In his initial statement to police, Kung stated that the loss was $19,000.

[9] References to Ray Jr. were redacted. (See *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).)

Ngo to open the safe. Kung thought he recognized the tallest of the three, who brandished a crowbar, from the July robbery. One of the robbers, possibly the tallest one, had a knife. Kung described one of the other two as about five feet eight inches tall, and the third as about five feet five inches tall.

Kenneth Rivers, a security guard, was at the main entrance to the store when the three robbers arrived. One forced him to his knees at gunpoint, and the other two made the manager open the safe. After the robbers fled, Rivers ran outside and saw a light colored late model Honda Civic leaving the area. Around that time Oakland Police Evidence Technician Katharine Potter was called to process a white Honda Civic abandoned with the motor running and a door open a couple blocks from the scene of the robbery. Inside was a black beanie or ski mask with the eyes and mouth cut out of it and a dark colored bandana.

Carrington testified that Ray III had repeatedly asked him to participate in a robbery and that he finally agreed to do so. He said that Ray III and Melissa picked him up at about 10:00 p.m. on an evening in November 2005, in a Honda that he believed was stolen. They drove to the Longs Drugs at 51st and Broadway in Oakland and robbed the store, getting about $12,000 from the store. After the robbery they went to a hotel in Alameda where they met Ray Jr.

Ray III told the police that he robbed the Longs Drugs store for a second time, with Carrington and Melissa, about six or seven months after the first robbery. Ray III said he had a knife and that Carrington held the security guard. As in other robberies, they used two stolen Hondas, driving to the location in one and leaving in another to make pursuit more difficult. They always used Hondas because that was the only brand of car that he knew how to steal. Ray III also said that they went to a hotel in Alameda after the robbery.

Counts 5 and 6 – Robberies of Sandeep Kumar and Kuldip Sekhon at the 7-Eleven Store on Harrison Street in, Oakland on April 18, 2006 [Ray Jr. and Ray III]

On April 18, 2006, Sandeep Kumar and Kuldip Sekhon were working at the 7-Eleven store at 2350 Harrison Street, Oakland. At about 1:45 a.m., two men arrived in

a silver colored Honda (observed on surveillance video) and entered the store. Both wore dark sweatshirts and had their faces covered. One was about five feet seven inches tall, and the other a little taller. One had a small silver gun. Both victims were ordered behind the register, and Kumar was forced to open the register. The robbers took the cash trays with money, lottery tickets and cigarettes.

Carrington identified both Ray Jr. and Ray III on the surveillance video, stating that Ray Jr. was the robber shown behind the counter pointing a gun at the head of one of the clerks.[10]

Ray III told police that he had robbed the 7-Eleven store on Harrison Street in Oakland twice in April, and that on both occasions he carried a plastic gun.

Count 7 – Robbery of Gary Boland at Voila Café in Oakland on April 21, 2006 [Ray III and Carrington]

On April 21, 2006, at approximately 10:50 a.m., Gary Boland, the owner of the Voila Café located at 510 Derby Avenue, Oakland, was watering plants just inside the front door of his business with his back to the door. A person came up behind him, held a metal object that he believed to be a gun to the side of his head, and said "welcome to Oakland, mother fucker." Boland was ordered to open the cash register, and the robber took about $200.

He could hear a conversation between the first robber and a second person, whom he could not see, about how to take the money, with the second person giving directions. He described the first robber as about five feet ten inches or five feet eleven inches tall, wearing a hooded jacket, dark clothing, with a red bandana as a mask. From the sounds of his voice and the small area of skin he could see, Boland believed the first robber was White.

At the time of the robbery, Ricardo Arias Tirado was working about one-half block from the café. He saw two men in a two door Honda drive past. Both had kerchiefs covering the lower portions of their faces, and both had hoods pulled up. The

[10] Ray Jr. was referred to in Carrington's testimony as "Big Eddie" and Ray III as "Little Eddie."

car drove around the block and pulled up in front of the café. The two men exited, leaving the car in the middle of the street with the doors open, and entered the café. They were inside for less than two minutes before they returned to the car and left. When returning to the car, one man was waving something in his hands that Arias Tirado thought might be a weapon.

Ray III admitted robbing the Voila juice bar on two occasions, once in April using a stolen car and a fake gun. Carrington said he robbed a juice bar on one occasion. He also said that Ray Jr., in describing robberies in which Carrington was not involved, mentioned a robbery of a juice bar.

Counts 8 and 9 – Robberies of Frezghi Tesfamicheal and Darshan Singh at the 7-Eleven Store on 41st and Broadway in Oakland on April 24, 2006 [Ray Jr. and Ray III]

On April 24, 2006, at about 1:30 a.m., Frezghi Tesfamicheal and Darshan Singh were working as clerks at the 7-Eleven store at 41st and Broadway in Oakland. Two men exited a small silver car and ran into the store. One man, wearing a black hooded sweatshirt, with his lower face covered, pointed a gun at Tesfamicheal and told him not to move. He was about five feet seven inches tall, and Tesfamicheal believed that the man was White from the area of his eyes that Tesfamicheal could see. The second robber was taller, about six feet two inches tall, wearing a grey sweatshirt, and seemed to be slightly older than the gunman. The gunman ordered Singh to open the cash register, and made both Tesfamicheal and Singh face the wall near the register. The men took cash from the register, although Tesfamicheal did not know how much, and cigarettes.

The robbery was captured on surveillance video. Ray III told police that he had robbed the 7-Eleven store at 41st and Broadway on two or three occasions.

Count 11 – Robbery of Sandeep Kumar at the 7-Eleven Store on Harrison Street in Oakland on April 29, 2006 [Ray Jr. and Ray III]

On April 29, 2006, at about 3:25 a.m., Sandeep Kumar and Kuldip Sekhon were again working at the 7-Eleven store at 2350 Harrison Street, Oakland. Two men, similar to the two who had earlier robbed the store, entered wearing sweatshirts with hoods and cloths covering their lower faces. One had a small silver gun. Kumar was ordered to

open the cash register and to surrender the money. The robbers also took cartons of cigarettes.

There was surveillance video of the robbery. Carrington identified the taller of the two robbers shown on the video as Ray III and the other as Ray Jr. Ray III admitted to police robbing this 7-Eleven store twice in April, and said that he carried a plastic gun both times.

Count 12 – Robbery of Nickolas Becker at Walgreens Drugstore at 34th Street and Telegraph Avenue in Oakland on May 13, 2006 [Ray Jr. and Ray III]

On May 13, 2006, at about 10:00 p.m., the Walgreens at 34th Street and Telegraph Avenue was closing for the evening. Nickolas Becker was the assistant manager. Becker was at the door waiting for the last customers to leave when he saw a grey Toyota or Honda pull up quickly. A man with a gun exited and ran toward Becker. He described the gunman as about six feet tall and weighing 150–160 pounds, wearing a black sweatshirt with a hood, and with his face covered with a red bandana. From the facial area he could observe, Becker could tell that the gunman was White. A second man, shown on surveillance video, entered the store behind the gunman.

Becker was first forced to the floor and then walked to the cash register at gunpoint when a clerk was unable to open the register. The robbers took the entire till from the register with about $700. The second robber took packages and cartons of cigarettes from the area of another register.

From the surveillance video, Carrington identified Ray Jr. as the person holding a gun to Becker's head and Ray III as the second robber.

Count 13 – Robbery of Vinh Lu at the Quick Stop Market on MacArthur Boulevard, Oakland on May 23, 2006 [Ray III and Carrington]

On May 23, 2006, at approximately 6:40 a.m., Vinh Lu was working at the Quick Stop market at 66 MacArthur Boulevard, Oakland. Two masked men entered the store with a gun, ordered him to pull out the cash register drawer and took all the money. There was a surveillance video of the robbery.

Carrington testified that he committed a robbery of the Quick Stop on MacArthur with Ray III, going to the scene in a stolen Honda. Ray III took the money and he took

lottery tickets. Carrington identified himself on the videotape as the individual wearing a black hoodie, with a red bandana on his face. He identified Ray III as the robber wearing a grey hooded sweatshirt, with a blue bandana on his face.

Ray III admitted to police that he had robbed this Quick Stop twice with Carrington, taking about $200 each time.

Count 14 – Robbery of Melisew Ayenew at the 7-Eleven Store at 41st and Broadway in Oakland on May 25, 2006 [Ray Jr. and Ray III]

On May 25, 2006, at about 11:24 p.m., Melisew Ayenew was working as a clerk at the 7-Eleven store at 4100 Broadway, Oakland when two men entered with their faces partially covered and told everyone in the store not to move. One of the robbers jumped the counter and took money from an open register. The other pointed a pistol in Ayenew's face, demanding that he open another register, and striking him in the face with the pistol and kicking him when he protested that it was broken. The blow drew blood. The robbers took money from under the register that Ayenew pointed out and cigarettes. Ayenew could see that one of the robbers was White, but could not see the face of the other.

Carrington again viewed a surveillance video of the robbery and identified Ray Jr. as the individual wearing a black hoodie and "army pants" and Ray III as the person behind the register wearing a grey hooded sweatshirt. Ray III told police that he had robbed this store two or three times using a plastic BB gun, but denied hitting anyone.

Count 15 – Robbery of Jose Hernandez at Round Table Pizza in Alameda on May 28, 2006 [Ray Jr. and Ray III]

On May 28, 2006, Jose Hernandez was the manager of the Round Table Pizza at 2611 Blanding Avenue, Alameda. The store, which was doing pickup and delivery business only, was in a temporary trailer in an isolated area. At about 9:30 p.m., after the restaurant had closed, Hernandez was sitting with friends in a back patio area when two men walked through the gate wearing dark clothes, with hoods over their heads and blue and red bandanas on their faces. One had a chrome handgun pointed at Hernandez. Hernandez was forced inside the trailer and made to open the safe. The robbers took two day's worth of receipts, consisting of eight bundles of currency. Hernandez described the

gunman as between five feet eight inches and five feet ten inches tall, with blue eyes. The second man was a little taller, and thin. Hernandez identified Ray Jr. as someone he had seen before in the area of the business.

Ray III, in his statement to police, said that he had robbed a Round Table in a trailer in Alameda near the Fruitvale Bridge. He claimed that he had a plastic gun, and that he took about $1,000.

Counts 16 and 17 – Robberies of Yong Kim and Stephen MacManus at South Shore Liquor Store in Alameda on June 23, 2006 [Ray Jr. and Ray III]

On June 23, 2006, at 9:30 p.m., two men wearing hoods and masks entered the South Shore Liquor store, located in the South Shore Center in Alameda. The owner, Yong Kim, was working at the cash register. Stephen MacManus was a customer. The taller of the two men held what Kim described as a long black gun and MacManus described as a shotgun with a black barrel and a dark brown stock. The man wore a black sweatshirt with the hood pulled up and a red bandana over his lower face. He was about six feet tall, and both Kim and MacManus could tell that he was White. The second man was shorter and held a grey or silver handgun. He wore a grey hooded sweatshirt with the hood pulled up, and a blue bandana over the lower part of his face.

The taller man pointed the shotgun at Kim and repeatedly demanded that he open the register. Kim gave the man the entire cash drawer containing about $700. The man with the shotgun then pointed it at MacManus and demanded his wallet. MacManus complied. MacManus looked at the face of this robber for about five to ten seconds, from a distance of about three feet. He could see the eyes, forehead, and some of the hair, which he said was sandy brown. He identified Ray Jr. in court as the man with the shotgun based on his complexion, the shape of his face, the area around his eyes, the color of his hair, and his height. He said that the build and general body shape of Ray III were consistent with the man with the handgun. In separate police lineups, MacManus had been unable to identify either Ray Jr. or Ray III.

Ray III admitted to police that he had robbed South Shore Liquor while wearing a hoodie and a bandana, and said that he had used a plastic handgun.

Counts 18 and 19 – Robberies of Seara Tesfamariam and Yash Hampaul at the 7-Eleven and 41st and Broadway in Oakland on June 30, 2006 [Ray Jr. and Ray III]

On June 30, 2006, at about 4:00 a.m., two men with guns entered the 7-Eleven at 4100 Broadway in Oakland and told the clerk, Seara Tesfamariam, not to move. Both men wore black coats, blue jeans, and ski masks. One man was taller than Tesfamariam, who was five feet five inches tall, and the second man was taller than the first. The taller of the two men jumped the counter and told "Yosh," another clerk in the store, to open the register. He opened the register at gunpoint and the robbers took the money. They also took lottery tickets and cigarettes. Police located a Honda Civic abandoned about five minutes away in the 2800 block of Webster Street with the engine still running, and with the steering column and right rear window broken.

Carrington was unable to identify anyone from the surveillance video. This was the store that Ray III admitted robbing two or three times.

Count 20 – Robbery of Joseph Adkins at Walgreens in Alameda on July 6, 2006 [Ray Jr. and Ray III]

On July 6, 2006, at 4:49 a.m., two armed men entered the Walgreens drugstore in the South Shore Shopping Center in Alameda. They were wearing black hooded sweatshirts, and had handkerchiefs covering the lower part of their faces. The shorter of the two men carried a shotgun, possibly sawed off, and the other had what assistant manager Joseph Adkins described as a Glock nine-millimeter handgun. The man with the shotgun forced Adkins to the registers and threatened to "blow [his] fucking head off" when Adkins had difficulty with his password. Once Adkins was able to open the register, the man grabbed the cash drawer which contained about $300. The second robber jumped over the counter at another register and took cigarettes. Adkins believed the robbers to be White or Hispanic.

Shortly after the time of the robbery, at about 5:00 a.m., Alameda police found a black Honda Civic about 300 yards from the Walgreens, abandoned with the engine running and the ignition tampered with.

Carrington identified Ray III as one of the two robbers shown in the surveillance video, but "c[ould]n't say" who the other was. Carrington denied that he was the second robber, noting that this man wore "army pants," and that he never wore such pants.

Ray III told police that he had robbed the Walgreens in South Shore in Alameda, driving there in a stolen Honda Civic. He wore a hoodie, with a blue and white bandana on his face, a took about $200 and cartons of cigarettes.

Count 22 – Robbery of Francis Shelley at the 7-Eleven Store on 23rd Avenue in Oakland on July 10, 2006 [Ray Jr. and Ray III]

On July 10, 2006, at 6:00 a.m., Francis Shelley was a customer in the 7-Eleven store at 324 23rd Avenue, Oakland. Two men entered, one with a gun, which Shelley described as a short-barrel shotgun. The clerk, Rita Thapa, described the gunman as about six feet tall and thin, wearing a sweatshirt, and with a dark blue or black handkerchief covering his lower face. The second person was shorter and wore a hooded sweatshirt. Both wore wrap-around sunglasses. Thapa thought both were Black. Shelley thought the gunman was Hispanic or Black, but could only see a small sliver of skin between the cheekbone and the sunglasses. Thapa was ordered to open the register and did so.

The gunman demanded Shelley's wallet, which was on the counter. When Shelley resisted the gunman struck him in the forehead with the weapon, drawing blood and gashing the skin to the bone, and knocking him to the floor. The robbers fled with the register cash drawer and with Shelley's wallet.

Shelley ran outside and saw the two men enter what he described as a burgundy front-wheel drive Japanese car, which a third person was driving. He was later taken by police to a location across from 527 23rd Avenue, near the Park Street Bridge to Alameda, where he identified a red Honda as the getaway car. The car had been found abandoned, with the engine running, no key in the ignition, and the ignition and steering column tampered with.

Shelley was taken to the hospital by ambulance for treatment of his wound. The wound required packing and stitches, and left a visible scar.

Ray III admitted to police that he had robbed the 7-Eleven store on 23rd Avenue.

Count 23 – Robbery of Andy Truong at AM/PM Market on Park Street in Alameda on July 18, 2006 [Ray Jr., Ray III and Carrington]

On July 18, 2006, at approximately 5:24 a.m., Andy Truong was stocking merchandise in the AM/PM Market at 1260 Park Street, Alameda. Three men entered the store, one with a shotgun and another with a handgun. The man with the shotgun was wearing a hooded sweatshirt, gloves and a red bandana. Truong described him as White, in his 30s, and about five feet seven and one-half inches tall. The second gunman was younger, also White, and about seventeen or eighteen years old. The surveillance video showed that the man had his face covered with a blue bandana, although Truong did not recall this. The third person was a tall Black man.

The robber with the shotgun repeatedly ordered Truong to open the register, saying "open the fucking register," but Truong was unable to do so. He gave them a four digit code which failed to work, but they were ultimately able to open the register using the first two digits. They took the money. Before they left the older man with the shotgun said, "You lied to me," and struck Truong in the head with the shotgun. Truong suffered a bleeding wound requiring eight staples to close.

Carrington testified that he committed the robbery with Ray Jr. and Ray III. He said that Ray Jr. had a shotgun, Ray III had a toy gun or a knife, and that he carried a toy shotgun. They drove to the scene in a stolen Honda. He saw Ray Jr. hit the Asian store clerk in the head with the shotgun before they left. Carrington identified Ray Jr. on photographs from the surveillance video as the person with the shotgun, and Ray III as the person at the register wearing the light blue bandana. He also identified himself on the tape. Ray Jr., giggling and laughing, later showed Carrington a newspaper article about the robbery mentioning the fact that the clerk required stitches. Ray Jr. appeared excited that he had made the papers.

During his police interview, Ray III was shown the surveillance video and identified himself and Carrington on the tape. They drove to the location in a stolen Honda, and took money and cigarettes.

The surveillance video also recorded the demands by the person with the shotgun that Truong "open the fucking register." Although Ray Jr. denied in his testimony that it was his voice on the tape, the video was played for the jury and the prosecution argued that Ray Jr.'s distinctive regional accent could be identified on the recording.

Count 24 – Robbery of Vinh Lu at the Quick Stop Market on MacArthur Boulevard in Oakland on July 20, 2006 [Ray III and Carrington]

On July 20, 2006, at about 6:15 a.m., Vinh Lu was again robbed by two men at the Quick Stop Market at 66 MacArthur Blvd, Oakland. They were driving the same type of car, and appeared similar to the two robbers from the May 23, 2006 incident. One was armed with a gun and Lu was again forced to open the cash register. The men took about $20 and some lottery tickets.

A customer, Lowell Saturnino, observed a green four door Honda Civic pull in front of the store with two occupants wearing dark clothing and masks over their faces. Because "it didn't look right," he wrote down the license number before he drove away. He later saw the vehicle abandoned in the middle of the street about a block away and advised police of its location.

Carrington testified that he robbed this Quick Stop with Ray III on only one occasion. Ray III told police that he and Carrington had robbed the Quick Stop twice.

Count 25 – Robbery of Issa Abdul-Kareem at the 7-Eleven Store at 4720 MacArthur in Oakland on August 1, 2006 [Ray Jr. and Ray III]

On August 1, 2006, at 3:55 a.m., two men with masks entered the 7-Eleven store at 4720 MacArthur Boulevard, Oakland. The clerk, Issa Abdul-Kareem, could tell from what skin area he could see that both were White. He said both were young, between 25 and 30 years old, and he described one as about five feet ten inches tall and 150 pounds. They talked to each other during the robbery "like family." One man had a gun and the other a knife. With both the gun and knife pointed at him, Abdul-Kareem opened the cash register and the men took the money from it. One of the men also took beer. He saw them flee in a newer Honda Civic. Police located the car about a block away with the motor running and the driver's door open.

The robbery was captured on surveillance video. Ray III admitted to a robbery of a 7-Eleven store "over by Seminary" about August 1st in which he used two stolen cars, and in which he used a knife.

Counts 26 and 27 – Robberies of Alan Rodrigues and Annica Henderson at the 7-Eleven Store on Aldengate Way in Hayward on August 8, 2006 [Ray Jr., Ray III, and Carrington]

On August 8, 2006, at 4:11 a.m., Alan Rodrigues was just leaving the 7-Eleven store on Aldengate Way in Hayward when three men with masks jumped out of a car parked behind Rodrigues's truck. They ordered him back into the store at gunpoint, with what he thought was a rifle. He described the man with the rifle as White and about five feet ten inches to six feet tall. This robber demanded Rodrigues's wallet, while the other two went behind the counter and opened the cash register. They left with money and beer.

Annica Henderson was also a customer inside the store when she saw the three robbers enter. One of the men, carrying what she thought was a small shotgun, demanded her wallet. She did not have one, but gave him $20. She described the person who took her money as the tallest of the three, about five feet eleven inches or six feet tall, with a thin build, wearing a pullover sweatshirt, and with a bandana covering his nose and mouth. She believed he was African-American. She described one of the other two as between five feet six inches and five feet eight inches tall, wearing a light colored hooded sweatshirt and a dark bandana, and carrying a knife. She could see from the skin around his eyes that he was Caucasian. The third robber, standing next to the other customer, was about five feet eight inches or taller, wearing a dark pullover sweatshirt and a bandana on his face. She thought he was African-American.

The robbery was captured on surveillance video. Carrington testified that he, Ray Jr. and Ray III went to the store in a stolen Honda. He identified Ray Jr. as the person wearing a black hoodie and camouflage pants. He identified himself behind the register wearing a blue jacket, and Ray III as the person next to him, wearing a beanie cap with the word "Oakland" on it. Ray III described to police a 7-Eleven robbery in Hayward in

which they had forced a customer back into the store. He identified himself from still photos taken from the surveillance video wearing a black knit cap with the words "Oakland 510 bound" on it, and Carrington wearing a skateboard coat. He also identified a photo of Rodrigues as the person they had forced back into the store.

Counts 28 and 29 – Robberies of Justin Gray and Nicole Johnson at Safeway on College Avenue in Oakland on August 20, 2006 [Ray III and Carrington]

On August 20, 2006, at 1:00 a.m., two men with shotguns entered Safeway on College Avenue in Oakland. Justin Gray was a customer waiting for change at a checkstand. One gunman, described as about five feet ten inches tall, wearing a jacket, a hood, something covering the lower part of his face and sunglasses, pointed his gun in Gray's face and demanded his wallet. He could only see the second gunman peripherally, but he seemed taller than the first man and was similarly dressed.

Nicole Johnson also was a customer in the store. A tall man pointed a shotgun at her friend, and Johnson ducked down near a cash register. Someone demanded Johnson's purse and she looked up to see a second robber pointing a pistol at her. He was about five feet ten inches tall, slender build, and was wearing a hoodie, ski mask, sunglasses and gloves. She could see some skin area and could tell that he was White. She surrendered her purse. She later indicated Ray III in one of two physical lineups as possibly being the man who took her purse.

Carrington testified that he and Ray III committed a robbery of this Safeway at 2:00 a.m., and that he believed that Ray III had taken a purse from a woman.

Count 30 – Attempted Robbery of Lourdes Jiminez at the Village Market on Broadway Terrance, Oakland on August 22, 2006 [Ray III and Carrington]

On August 22, 2006, at 11:30 a.m., two men wearing sweatshirts, with bandanas covering their lower faces, entered the Village Market at 5885 Broadway Terrace, Oakland. Lourdes Jiminez worked in the deli department at the market. A man wearing a black hooded sweater pointed a gun at her and demanded that she open the cash register. She described him as about five feet eight inches tall. She was not a checker and was unable to open the register. The man unsuccessfully tried to open another register. She heard another male voice saying, "come on, let's go, let's go."

Horacio Valencia, who was doing construction work at the market, was in the parking lot when he saw the two men wearing masks pull into the parking lot in a black Honda Civic. They pointed a gun at him as they fled the store in the same vehicle. He saw that one of the two men had Black hands.

Carrington testified that he and Ray III had tried to rob the Village Market, but did not get any money. Ray III told police that he and Carrington had tried to commit a robbery on Broadway Terrace, but fled when a woman who worked in the "fruit department" couldn't open the register. The attempted robbery was recorded on surveillance video.

Count 31 and 32 – Robberies of Richard Klunge and Maria De Ayala at Voila Café in Oakland on August 22, 2006 [Ray III and Carrington]

On August 22, 2006, at about 1:35 p.m., a light-complexioned blue-eyed White male, wearing a bandana to cover his face, entered the Voila Café (see also count 7). He pointed what may have been a toy gun at Maria De Ayala. De Ayala worked at the restaurant as a cook, server, and cashier. When she initially hesitated to open the cash register in response to the robber's demands, the gunman said "open the cash register, bitch." She finally did so and the gunman grabbed all the money. She saw only a shadow of a second man in the lobby area.

Richard Klunge, a customer in the restaurant, saw two people enter. One walked past him and the second, identified as a man by Klunge, pointed a handgun at him and demanded his wallet, which he surrendered. This gunman wore a hood and a mask, but Klunge could tell from skin around the eyes that he was African-American with a thin build, between five feet nine inches and five feet ten inches tall. The gun projected a laser dot. Klunge ran out of the restaurant when the robber pointed his gun at another customer. Klunge went to a nearby janitorial supply store to ask someone to call the police. He could see the two robbers run to a silver imported car parked in front of the restaurant and speed away. The robbery was captured on surveillance video.

Seng Saeliew was fishing with friends on a pier on Alameda Avenue, Oakland near the Fruitvale Bridge at around 1:30 p.m. on August 22, 2006. They were parked

near a cream colored recreational vehicle (RV) with a brown stripe. He saw a small young attractive woman with blond hair in the RV talking to an older White man with light brown bushy hair, about five feet ten inches tall, who Saeliew described as looking like a hippie. The man and woman exited the RV and seemed to be waiting for someone. Saeliew heard a screeching noise and saw a silver Honda Civic come to a stop about 60 feet from the RV. He saw two men exit, both about five feet seven to five feet eight inches tall, with thin builds, and enter the RV after speaking to the man and woman. All four people then left in the RV. The doors and windows of the Honda were left open with the engine running, and Saeliew saw that there was no key in the ignition.

Carrington testified to participating in a robbery of a juice bar on the same date of the attempted robbery of the Village Market (see count 30). He identified himself and Ray III on the surveillance video. He said that he took a wallet from a customer, using a toy gun with a laser pointer, while Ray III went behind the counter. After the robbery they met Ray Jr. at a motorhome that Ray Jr. was driving.

Ray III told police that he and Carrington robbed the juice bar wearing hoodies, beanies and bandanas. Carrington's toy gun had a "little red dot thing." They used a stolen grey Honda Civic. After the robbery they left the car near the Fruitvale Bridge and met Ray Jr. at his RV.

Count 33 – Assault on Kevin Mixon at Safeway on College Avenue in Oakland on August 25, 2006 [Ray III, Carrington, and Melissa]

Kevin Mixon was a security guard at the Safeway market at College Avenue and Claremont in Oakland (see counts 28 and 29). On August 25, 2006, at about 3:00 a.m., Mixon was standing near the front door when a man entered, pointed a pistol at him, and told him to "freeze." The gunman wore a black mask, and was tall and lanky. The gunman was with two people who also wore masks: a petite woman and a slender man who was shorter than the first man. Mixon believed that all three were White.

Mixon punched the gunman and tried to disarm him. The girl hit Mixon over the head with a plastic bucket-like vase used by the store to hold flowers. The gunman was able to break free and all three fled. Mixon pursued them, first on foot and then in his

car. He saw the people run to a white Honda which he tried to follow. He found the Honda around a corner, abandoned with the motor still running, with no keys in the ignition and the ignition broken. As Mixon drove back to the Safeway, he saw a green Honda driving toward him. The shorter of the two men who had fled from the store was driving. He had curly hair and was between 19 and 22 years old. Mixon turned to pursue the car, but found it also abandoned in a dead-end street. The ignition had been removed.

Carrington testified that he, Melissa, and Ray III were involved in this incident. Ray III also described these events in his statement to police. He said that he had been tackled by the security guard, and that he, Carrington and Melissa had stolen two Honda Civics.

Count 1 – Robbery of Ved Goyal at the 7-Eleven Store on 2411 MacArthur Boulevard in Oakland on August 27, 2006 [Ray Jr. and Ray III]

On August 27, 2006, at about 12:55 a.m., Ved Goyal and Mangit Singh were working at the 7-Eleven store at 2411 MacArthur Boulevard, Oakland. Two men entered the store wearing masks. One grabbed Goyal and took him toward the cash register. Singh described one man as taller, about six feet tall, and the other as shorter, about five feet seven inches or five feet eight inches tall. Singh thought the taller man was Black, and the shorter man was White. The taller man had a gun and demanded that Goyal open the register. The two men took the cash tray from the register and put it in a bag. The men also took a set of keys, and the man with the gun took a carton of cigarettes. The men ran to a car parked sideways in the parking lot.

Oakland Police Officer Christopher Saunders was driving past the 7-Eleven store at about 12:55a.m., when he saw three men run from the store, one with his hands up. Two of the men ran to a green Honda Civic in the middle of the store's parking lot. One had a red bandana over his face and the other wore a blue and black windbreaker jacket with the hood pulled up. Both were White. Saunders ordered the men to stop at gunpoint, but they entered the car and fled from the scene with the officer in pursuit.

After a high speed chase for about four miles, Saunders was able to force the Honda into a spin on East 12th Street, near Third Avenue. Ray Jr. was removed from the

driver's seat and Ray III from the passenger seat. Saunders had to break open the passenger window to forcibly remove Ray III from the vehicle. Ray Jr. resisted arrest and officers used a Taser to subdue him. Ray Jr. was photographed wearing a dark blue shirt with an Oakland Raiders logo, and Ray III was wearing a blue and black hooded jacket. Ray Jr. was wearing gardening gloves on both hands when arrested.

The cash register drawer with money was on the back seat of the Honda, and a carton of cigarettes was on the front passenger floorboard. A red bandana was found between the driver's seat and the door. Also recovered from the car were gloves, a beanie cap with an Oakland Raiders logo, and a plastic toy gun with a portion of the butt broken. The ignition on the steering column of the vehicle had been punched out.

Search of the Ray's Recreational Vehicle

Acting on information provided by Ray Jr. following his arrest, a white RV/van with a stripe on the side belonging to the Ray family was located at 65th Street and Telegraph Avenue in Oakland in the early morning hours of August 27, 2006. Ray Jr.'s wife, Tina Ray, Melissa and a younger daughter were contacted in the RV. A search warrant for the RV was obtained, and police recovered camouflage pants, gloves, a box for a replica handgun with a laser sight, black baseball caps with Raider emblems, and computer printouts and hand-written notes and diagrams on how to hotwire vehicles. A Honda Civic with a punched ignition was located less than a block away from the RV.

Ray III's Statements to Police.

As discussed above, Ray III gave a statement in which he admitted involvement in the series of robberies. He said that he typically wore a hat and a bandana in the robberies, and frequently wore a hoodie and gloves. He said that toy guns were usually used, and denied using a real gun. He admitted, however, that there was a single barrel shotgun with a pistol grip that "maybe" was used in one of the robberies. On the day of the last 7-Eleven robbery he had stolen two Honda Civics, as he usually did. Melissa was waiting in the second stolen Honda one street away.

Ray Jr.'s Statements to Police

While being transported to the hospital after being tasered during his arrest, Ray Jr. said to the transporting officer "[a]ll you got me on is a 211" and "I know who you're looking for. I read the papers. You guys have been betting on who is going to get us." During the ride to the hospital, Ray Jr. had removed the gloves he had been wearing, and they were found in the rear seat of the patrol car. When transported that same evening from the hospital to the police station, Ray Jr. said "I know I'm a bad example for a father. I'm worried about my son for getting him involved. I know this is a bad one. How much time do you think I'll get for this one?"

Ray Jr. was interviewed by detectives on August 27, 2006, at 10:57 p.m. He said that he lived in the RV with his wife and three children, including Ray III and Melissa. In the recorded portion of the interview, he admitted committing the 7-Eleven robbery for which he had been apprehended, saying that he had entered the store wearing his black Raider's shirt and a red "scarf" on his face, carrying a toy gun, and that he "went for" the register. After the recording was turned off, he further stated that he was responsible for some, but not all of the other robberies, that "people" in an area where he used to live on Pearl Street in Oakland were "framing" him, and that he had an alibi.

Evidence of Ray Jr.'s Post-Arrest Conduct

On February 21, 2007, prior to his trial testimony, Carrington was inadvertently placed in a holding cell with Ray Jr. and other inmates. Ray Jr. told other inmates that Carrington was "snitching" and as a result, Carrington was assaulted by another inmate. Ray Jr. told Carrington not to testify.

At the time of the preliminary hearing on November 1, 2006, Ray Jr. was searched and a note was found in his sock. The note, which was read to the jury during cross-examination of Ray Jr. at trial, appeared to be directed to Ray III: suggesting that Ray III confess; promising money to Ray III if he got out; and saying, "If you do take this, I will owe you forever." Ray Jr. denied writing or reading the letter, and said that someone had handed it to him on the prison bus.

Ray Jr.'s Trial Testimony.

Ray Jr. testified, denying involvement in any of the robberies, including the 7-Eleven robbery where he was arrested fleeing the scene. He said that he went to the 7-Eleven that night to pick up Melissa. Melissa jumped into the car with a brown paper bag. Ray Jr. started to enter the store when Carrington almost knocked him down running out. He and Ray III then ran to the car and he fled from the police because he knew the car that they were driving was stolen. Melissa and Carrington fled separately. He denied having the toy gun found in his car, said that he was wearing a bandana around his neck (and not on his face) because it was "chilly," and said that the garden gloves he was wearing were his "driving gloves." He denied confessing to the robbery, and said that he had not mentioned Carrington to police after his arrest because Carrington was at large and he feared for his family. He insisted ". . . as I [have] stated numerous times[,] I'm a law abiding citizen. I have no prior offenses. . . . I've never been convicted of any drug offense or anything. I had a minor alcohol problem which I have canned by taking classes. Other than that, I don't have a record." On cross-examination he denied physically assaulting his daughters, having smoked crack cocaine, or telling police officers that he had smoked crack cocaine and marijuana in front of his children. He admitted that he had been charged with public drunkenness and disorderly conduct, charged with aggravated assault on Tina Ray in Pennsylvania, and that he had been put on probation for simple assault on Tina as a result in what he termed as "drunken melee." He insisted, however, that "I'm not a violent person."

Officer James Saleda of the Oakland Police Department testified in rebuttal. Saleda interviewed Ray Jr. in custody on March 8, 2001, in connection with an investigation for physical abuse of his daughter, Melissa. In that interview Ray Jr. admitted to striking his wife and two of his daughters, and smoking both crack cocaine and marijuana in his house.

The Verdicts

Two charged counts against Ray Jr. and Ray III (counts 10 & 21) were dismissed by the court on the District Attorney's motion at the close of the prosecution evidence

(§ 1118.1). On March 20, 2007, a jury convicted Ray Jr. of 21 counts of second degree robbery as charged (§ 211; counts 1–3, 5, 6, 8–9, 11–12, 14–20, 22–23, 25–27) and found true allegations that he personally used a firearm in the commission of four of the robberies (§§ 12022.5, 12022.53, subd. (b); counts 16–17, 22–23), was armed with a firearm in the course of four offenses (§ 12022, subd. (a)(1); counts 2–3, 26–27), and that he inflicted great bodily injury in two instances (§ 12022.7; counts 22–23).[11]

The jury found Ray III guilty of all remaining 29 counts of second degree robbery (§ 211), and one count of attempted robbery (§§ 664, 211). On the charge of assault with a deadly weapon (count 33) , the jury found Ray III guilty of the lesser included offense of simple assault (§ 240). The allegations that Ray III was armed with a firearm during eight of these offenses (§ 12022, subd. (a)(1); counts 2–3, 16–17, 22–23, 26–27) and that he used a deadly weapon (a knife and a crowbar) in the commission of another (§ 12022, subd. (b)(1); count 4) were found by the jury to be true.

Sentencing

On April 17, 2007, Ray Jr.'s motion for new trial, motion to set aside the verdict, and motion to dismiss the weapons enhancements were all denied. He was found to be ineligible for probation by virtue of the firearm use enhancements, and sentenced to an aggregate term of 38 years 4 months in state prison. He filed a timely notice of appeal on that date.

On April 24, 2007, Ray III was certified to the juvenile court pursuant to Welfare and Institutions Code section 604 for a fitness determination on counts 2 and 3, due to his minority at the time of both offenses.[12] Following remand, the court referred Ray III for a 90-day diagnostic evaluation pursuant to section 1203.03. After receipt of the report from the Department of Corrections, Ray III was sentenced on October 5, 2007, to an aggregate term of eight years in state prison. His timely notice of appeal was filed on October 30, 2007.

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[11] The allegation that Ray Jr. used a knife in the commission of count 25 (§ 12022, subd. (b)(1)) was dismissed on motion of the district attorney before jury instructions.

[12] Ray III was born on October 12, 1987.

II. DISCUSSION

Ray Jr. alleges error in: (1) insufficient evidence to support his conviction on the robberies charged in counts 2, 3, 8, 9, 15, 18, 19, 20, 22 and 25; (2) Carrington's identification of him at trial on surveillance tapes from certain robberies; (3) admission of the redacted confession of Ray III in their joint trial; (4) improper instructions as to accomplice testimony and as to cross-admissibility of evidence on the multiple charged offenses; and (5) improper impeachment of his trial testimony.

Ray III's appeal challenges: (1) the admissibility of his post-arrest statements to police; (2) the court's instructions to the jury on cross-admissibility of evidence on the multiple charged offenses; and (3) the effectiveness of his trial counsel.

We discuss first the issues raised by both appellants as to the jury instructions.

A. The Claim of Instructional Error on Consideration of the Evidence Has Been Forfeited

Both appellants contend that the court erred in instructing the jury using a modified form of CALCRIM 3515, which advised the jurors that "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one. *In doing so, you must impartially compare and consider all the evidence that was received throughout the entire trial*."[13] (Italics added.) The court made clear it was giving this modification in lieu of requested a prosecution instruction on consideration of similar offenses to show identity under Evidence Code section 1101.[14]

Both appellants insist that instructing the jury to consider "all the evidence" impermissibly allowed the jury to consider evidence on some counts that was not otherwise cross-admissible as evidence of guilt on other counts. Ray Jr. asserts that this

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[13] This last sentence is taken virtually verbatim from the CALCRIM 220 instruction on reasonable doubt, which provides in pertinent part that "In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial."

[14] Presumably CALCRIM 375.

permitted the jury to improperly convict him on at least some charges using inadmissible modus operandi evidence and Ray III argues that the instruction was prejudicial as to him in that it "effectively relieved the prosecution of its burden to prove each element of an offense beyond a reasonable doubt." Ray Jr. also complains that the court's instruction "left the jury with no guidance on proper consideration of evidence of similar acts to show pattern, intent, or identity [(*People v. Ewoldt* (1994) 7 Cal.4th 380)] and left the jury to speculate as to the sufficiency of additional counts to show identity."

There is no record that Ray III interposed any objection to the instruction. The record reflects objection only by counsel for Ray Jr. Having failed to raise this claim below, Ray III may not now assert it on appeal. (See, e.g., *People v. Stitely* (2005) 35 Cal.4th 514, 546; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 8:229, p. 8-155.) As to Ray Jr., we find that his claim of error is forfeited by his failure to seek any limiting instruction on use of the evidence, either at the time the evidence was received, or in the final instructions to the jury.

Ray Jr. focused, both in his briefs and in oral argument, on the question of whether the evidence adduced at trial was properly cross-admissible under Evidence Code section 1101, subdivision (b), and the criterion for admissibility and consideration of modus operandi evidence to circumstantially establish his guilt on those counts where there was no direct evidence connecting him to the offense.[15] In challenging cross-admissibility of

[15] By letter dated September 14, 2009, we also asked counsel to address at oral argument the following questions: "1) Do different standards apply for consideration of evidence of other offenses under Evidence Code section 1101[, subsection] (b) when those offenses are charged crimes in the same information, than when the other offenses are uncharged crimes?[;] 2) The application, if any, of the decisions in *People v. Quintanilla* (2005) 132 Cal.App.4th 572 (remanded for further consideration on other grounds in *Quintanilla v. California* (2007) 549 U.S. 1191), and *People v. Wilson* (2008) 166 Cal.App.4th 1034 (dealing with cross-admission of evidence of joined offenses under Evidence Code section 1108)."

In *Quintanilla*, Division Three of this District held that it was error to instruct a jury, using a modified form of CALJIC 2.50.02 [CALCRIM 852], to consider other charged and uncharged domestic violence offenses as propensity evidence of guilt under Evidence Code section 1109. The court reasoned that permitting consideration of other

evidence on the various counts, Ray Jr. relies primarily on authorities addressing standards for introduction of evidence of uncharged misconduct (*People v. Lewis* (2001) 25 Cal.4th 610; *People v. Ewoldt, supra,* 7 Cal.4th 380; *People v. Balcom* (1994) 7 Cal.4th 414; *People v. Rivera* (1985) 41 Cal.3d 388). Ray Jr.'s arguments, however, ignore the significance of the context in which the evidence was presented to this jury—trial of properly joined multiple offenses. (§ 954; see *People v. Ochoa* (1998) 19 Cal.4th 353, 409.)

Here there was no request by appellant to sever any of the multiple charged counts, and no evidence of any *uncharged* misconduct was presented to the jury. Rather, appellant was charged by a single information with a series of offenses, all of the "same class of crimes or offenses," which the prosecution argued were "connected together in their commission," and which appellant has never contended were inappropriately joined.[16] Offenses may be connected together in their commission even though they

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charged offenses for this purpose would remove the statutory and due process protections the defendant would otherwise receive through the court's ability to weigh the prejudicial effect of the offered evidence and to potentially exclude it under Evidence Code section 352—a calculation the court would be precluded from making with respect to evidence of jointly charged offenses. (*People v. Quintanilla, supra,* 132 Cal.App.4th at pp. 581–582.)

In *Wilson,* the Sixth District distinguished *Quintanilla* and approved use of a modified form of CALCRIM 1191, permitting consideration by the jury of evidence of a charged sexual offense to establish the necessary specific intent with respect to a different charge, finding the evidence properly cross-admissible under both Evidence Code sections 1108 and 1101, subdivision (b). (*People v. Wilson, supra,* 166 Cal.App.4th at pp. 1052–1053.) The court noted that the trial judge had in fact engaged in the weighing process under Evidence Code section 352 in considering cross-admissibility of the evidence, and that the instruction had been modified to require (as in this case) proof of each element of each offense beyond a reasonable doubt, and did not permit use of a preponderance of the evidence standard to establish the propensity offense. (*Id*. at p. 1053.)

In the instant case, the jury was not instructed as to inferences to be drawn from evidence of other offenses, and since our decision ultimately does not turn on the application of Evidence Code § 1101, subsection (b), we do not find these cases persuasive or dispositive in this context.

[16] Ray Jr. moved only for severance of his trial from that of Ray III, as discussed *post*, on *Bruton/Aranda* grounds. (*Bruton, supra,* 391 U.S. 123; *People v. Aranda* (1965)

" 'do not relate to the same transaction and were committed at different times and places [and] against different victims.' [Citations.]" (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1218, italics omitted.) Further, it is not required that evidence be cross-admissible before jointly charged offenses may be tried together before the same trier of fact. (§ 954.1; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1129, fn. 10, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)[17]

As discussed *post*, we do not agree with Ray Jr.'s contention that modus operandi was the only basis for cross-admissibility of evidence presented or the only manner in which evidence of other crimes was relevant. Nevertheless, we will assume, without deciding, that not all of the robberies reflected common marks sufficient to establish identity circumstantially, and that if some of the offenses had been separately charged or uncharged, would not be sufficiently "similar" to meet the standards for admissibility. Evidence of uncharged misconduct is admissible to prove identity when "the uncharged misconduct and the charged offense . . . share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403; see also *People v. Thornton* (1974) 11 Cal.3d 738, 756 [overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12; inference depends upon the presence of distinctive "marks" that are "shared by the uncharged and charged crimes"].)

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63 Cal.2d 518.) Section 954 provides: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts . . . ."

[17] In June 1990, California voters approved Proposition 115, which added section 954.1, providing that "[i]n cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact." Section 954.1 "prohibits the courts from refusing joinder strictly on the basis of lack of cross-admissibility of evidence." (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285.)

Ray Jr. was on notice, however, from the time of the prosecutor's opening statement that she intended to argue cross-admissibility[18] but made no request for a limiting instruction on consideration of the evidence, either during the presentation of the prosecution case or after. "Under the doctrine of 'limited admissibility' [citation], certain evidence may be admissible for one purpose or against one party and inadmissible for another purpose or against another party. Because it cannot be excluded, an objection to its admissibility will be futile. Counsel is entitled only to an instruction to the jury, informing them of the limited purpose for which the evidence may be considered, and the fact that it went in without limitation is unappealable unless the instruction was requested. [Citations.]" (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 382, p. 474.) Evidence Code section 355 provides: "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly." (Italics added.) Under Evidence Code section 355, a limiting instruction must be requested. If not, it is deemed waived as an appellate issue. (*People v. Boyer* (2006) 38 Cal.4th 412, 465.)[19] Ray Jr. requested no instruction restricting the jury's consideration of cross-admissibility of evidence to particular factor or factors, and he cannot now complain that the court failed to do so.

Our Supreme Court has held that "[t]he trial court has no sua sponte duty to give a limiting instruction on cross-admissible evidence in a trial of multiple crimes." (*People v. Maury* (2003) 30 Cal.4th 342, 394; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 924–925 [no sua sponte duty to instruct the jury as to the admissibility or use of other sex

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[18] "Ladies and gentlemen, I want you to pay particular attention to those common features, the MO, the Hondas, the fact that they are taking money, cigarettes, and often lottery tickets. Pay particular attention to the way they are dressed."

[19] We recognize the tactical dilemma, acknowledged by Ray Jr.'s counsel at oral argument, this may present to trial counsel. Counsel may understandably not wish to risk emphasizing by a limiting instruction the effect of otherwise admissible evidence. (See *People v. Horning* (2004) 34 Cal.4th 871, 909–910; *People v. Maury*, *supra*, 30 Cal.4th at p. 394; *People v. Freeman* (1994) 8 Cal.4th 450, 495.)

crimes evidence offered under Evidence Code section 1108 and no duty to edit defendant's partially incorrect instruction]; *People v. Collie* (1981) 30 Cal.3d 43, 64 [no duty to give sua sponte limiting instruction on evidence of uncharged prior assaults on victim].) A narrow exception to this rule has been recognized in the " 'occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose.' " (*People v. Rogers* (2006) 39 Cal.4th 826, 864 [quoting *People v. Collie*, *supra*, 30 Cal.3d at p. 64].) Since the evidence presented here was directly relevant to the legitimate purpose of proving elements of charged offenses, this is not such an "extraordinary case."[20]

B. Accomplice Instructions Regarding Larry Carrington

The court instructed the jury that Larry Carrington was an accomplice as a matter of law with respect to counts 4, 7, 13, 23, 26, 27, 28, 29, 30, 31, 32, and 33. (CALCRIM 335.) These were counts in which Carrington admitted participating. Ray Jr. claims error in failure to instruct the jury that, as an accomplice, Carrington's testimony should be viewed with caution and required corroboration as to other counts in which Carrington denied involvement.

Appellant points to evidence in only two of the remaining counts as supporting an inference that Carrington participated in these robberies—count 1, the August 27, 2006 robbery of the 7-Eleven store on MacArthur Boulevard, and count 22, the July 10, 2006 robbery of the 7-Eleven store on 23rd Avenue in Oakland. In count 22, a victim said that a third person drove a getaway car, and in count 1, Ray Jr. testified that he observed Carrington running from the store. Assuming that the jury could reasonably find that

[20] This case well illustrates the impracticability of requiring the trial court to formulate its own limiting instruction, with a multitude of charged counts, and a variety of potential theories on which some evidence directly relevant to one offense might be circumstantially relevant to another. It is difficult to envision how the trial judge could parse the evidence in this fashion without appearing to comment on that evidence, at the same time ensuring that such comments "be accurate, temperate, nonargumentative, and scrupulously fair." (*People v. Linwood* (2003) 105 Cal.App.4th 59, 73.)

Carrington was an accomplice in either case,[21] and that an accomplice instruction would be appropriate, any error in failing to so instruct was unquestionably harmless. Most significantly, Carrington did not offer testimony implicating Ray Jr. in either matter, so there was no testimony by Carrington relating to either count requiring corroboration. It is further impossible to see how the jury might have viewed the testimony of Carrington's, who testified in custody and wearing restraints, in a different light had they considered him an accomplice in 13 robberies rather than 11, particularly since only slight corroboration was required for his testimony (*People v. Avila* (2006) 38 Cal.4th 491, 562–563), and as discussed *post*, there was ample corroboration. A failure to instruct on accomplice liability is harmless if there is sufficient corroborating evidence in the record. (*People v. Richardson* (2008) 43 Cal.4th 959, 1024.)

C. Identification of Ray Jr. in the Surveillance Tapes

As previously discussed, there was surveillance video of nearly all of the robberies. Over defense objection, Carrington identified Ray Jr. and Ray III as the robbers shown on the video relating to count 11 (April 29, 2006 robbery of Sandeep Kumar at the 7-Eleven Store on Harrison Street, Oakland); count 12 (May 13, 2006 robbery of Nickolas Becker at Walgreens Drugstore, 34th Street and Telegraph Avenue, Oakland); and count 14 (May 25, 2006 robbery of Melisew Ayenew at the 7-Eleven Store, 41st and Broadway, Oakland).[22] The court permitted the testimony as lay opinion, based on the witness's familiarity with both men. Ray Jr. alleges that this was error. As

[21] From Ray Jr.'s conviction on count 1 it is apparent that the jury rejected his self-exculpatory testimony.

[22] Ray Jr. also objects here to Carrington's identification of Ray Jr. and Ray III on video from counts 5 and 6, the April 18, 2006 robberies of Sandeep Kumar and Kuldip Sekhon at the 7-Eleven Store on Harrison Street, Oakland. However, he neither objected to the identifications when the testimony was given, nor did he move to strike the testimony when his later objection was made. The issue as to these two counts is therefore waived. (*People v. Partida* (2005) 37 Cal.4th 428, 433–434 (*Partida*).) Carrington also, without objection, identified himself, Ray Jr. and Ray III in photographs and video taken of robberies in which Carrington participated. He was unable to identify Ray Jr. in a video relating to count 20, a Walgreens robbery in Alameda, but did identify Ray III.

he acknowledges, the decision to admit lay opinion testimony is within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion. (*People v. Mixon* (1982) 129 Cal.App.3d 118, 127.)

Non-expert testimony in the form of an opinion is limited to an opinion that is "(a) [r]ationally based on the perception of the witness; and [¶] (b) [h]elpful to a clear understanding of his testimony." (Evid. Code, § 800.) The identity of the perpetrator of an offense whose image was caught on film or videotape is a proper subject for lay opinion testimony. (*People v. Ingle* (1986) 178 Cal.App.3d 505, 513 (*Ingle*); *People v. Perry* (1976) 60 Cal.App.3d 608, 614–615.) There are "two predicates for the admissibility of lay opinion testimony as to the identity of persons depicted in surveillance photographs: (1) that the witness testify from personal knowledge of the defendant's appearance at or before the time the photo was taken; and (2) that the testimony aid the trier of fact in determining the crucial identity issue." (*People v. Mixon*, *supra*, 129 Cal.App.3d at p. 128.) "Where the photo is unclear, or the defendant's appearance has changed between the time the crime occurred and the time of trial, or where for any reason the surveillance photo is not conclusive on the identity issue, the opinion testimony of those persons having knowledge based upon their own perceptions (Evid. Code, § 800, subd. (a)) of defendant's appearance at or before the time the crime occurred is admissible on the issue of identity, and such evidence does not usurp or improperly invade the province of the trier of fact. [Citations.]" (*Ingle*, *supra*, 178 Cal.App.3d at p. 513.)

Ray Jr. insists that "there was no showing that Carrington possessed special insight that made him more able to indentify appellant in surveillance video than the jurors" and that the jury was as capable as Carrington in evaluating whether Ray Jr. could be identified in the videos. Carrington's personal knowledge of Ray Jr.'s appearance and of the clothing he wore, both from his close social contacts with the family and from his direct participation with Ray Jr. and Ray III in several robberies, was established by the evidence. The surveillance photographs themselves were not conclusive on the issue of identity since the robbers were masked, and the court could reasonably conclude that

Carrington's testimony would assist the jury on the issue of identity. The jury was also instructed on evaluation of lay opinion, and told that they were free to disregard all or any part of an opinion if they found it "unbelievable, unreasonable, or unsupported by the evidence." (CALCRIM 333.)[23]

We find no abuse of discretion in admitting this testimony.

D. Redaction of Ray III's Statements

Ray III did not testify at trial. A transcript of Ray III's statements to police, in which he admitted his participation in the majority of the charged offenses, was read to the jury with all references to Ray Jr. redacted. The trial court required that the redaction be done in such a fashion as to "eliminate all references, not only to the nondeclarant's name, but also to the nondeclarant's very existence," relying on *Richardson v. Marsh* (1987) 481 U.S. 200 (*Richardson*) and *People v. Fletcher* (1996) 13 Cal.4th 451 (*Fletcher*). The jury was also instructed that it could consider Ray III's statements only as to him, and not as to Ray Jr.

Ray Jr. asserts that the redaction "proved futile" and remained "powerfully incriminating." He contends that he was deprived of his Sixth Amendment right of confrontation by introduction of this evidence. (*Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*); *Bruton, supra,* 391 U.S. 123.) We disagree.

Appellant's argument is that, despite removal of any reference in Ray III's statement to any other person, the statements "linked with other evidence produced at trial," including the surveillance videos revealing the participation of other culprits, made the redactions ineffective. The very argument that appellant makes here, however, has

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[23] CALCRIM 333 provides: "Witnesses, who were not testifying as experts, gave their opinions during the trial. You may but are not required to accept those opinions as true or correct. You may give the opinions whatever weight you think appropriate. Consider the extent of the witness's opportunity to perceive the matters on which his or her opinion is based, the reasons the witness gave for any opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence."

been rejected by the United States Supreme Court in *Richardson*, *supra*, 481 U.S. 200, and by our own Supreme Court in *Fletcher*, *supra*, 13 Cal.4th 451—cases upon which appellant relies.

A defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant. (*Bruton, supra*, 391 U.S. 123.) In *Richardson*, the Supreme Court refused to extend what it termed the "narrow exception" created in *Bruton* to the "almost invariable assumption of law that jurors follow their instructions" when told to consider evidence only for limited purposes. (*Richardson*, *supra*, 481 U.S. at pp. 206–207.) In the case before the Court, defendant Marsh and two other individuals were jointly charged with assault and multiple murders. A confession given by one codefendant was redacted to omit all reference to Marsh, and further to omit all indication that anyone other than the codefendant and the then fugitive third defendant participated in the crime. (*Id.* at p. 203.) The confession as redacted was not incriminating on its face, but became so only when linked with evidence introduced later at trial, in this case the defendant's own testimony. The Supreme Court granted certiorari after the Court of Appeal granted Marsh's petition for habeas corpus, holding that a trial court must assess the confession's "inculpatory value" under *Bruton* by examining not only the face of the confession, but also all of the evidence introduced at trial, and that Marsh's own trial testimony placing her in a vehicle with the codefendant near the time of the offense made the codefendant's statement "powerfully incriminating" to Marsh, thereby violating the Confrontation Clause. (*Id.* at pp. 205–206.)

The Supreme Court rejected the "evidentiary linkage" or "contextual implication" approach to *Bruton* questions adopted by the Court of Appeal, noting the problems which would arise if such a rule were adopted. Among the difficulties created would be an inability to comply with the "*Bruton* exception" by means of redaction, and the impossibility of predicting the admissibility of a confession in advance of trial, presumably requiring a trial judge to assess at the end of each trial whether, in light of all

of the evidence, a nontestifying codefendant's confession has been so "powerfully incriminating" that a new, separate trial is required for the defendant. (*Richardson*, *supra*, 481 U.S. at pp. 208–209.) Rejecting this approach, and the position Ray Jr. urges here, the Court held, "While we continue to apply *Bruton* where we have found that its rationale validly applies [citation], we decline to extend it further. We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (*Id.* at p. 211; see also *Gray v. Maryland* (1998) 523 U.S. 185, 195 ["*Richardson* placed outside the scope of *Bruton's* rule those statements that incriminate inferentially"].)

Our own Supreme Court in *Fletcher* declined to draw a bright line rule on the efficacy of redaction which retains references to a coparticipant in the crime while removing the coparticipant's name, requiring a determination on a case by case basis whether the nondeclarant defendant's constitutional right of confrontation is violated. (*Fletcher*, *supra*, 13 Cal.4th at pp. 456–457.) "[T]he efficacy of this form of editing must be determined on a case-by-case basis in light of the other evidence that has been or is likely to be presented at the trial. The editing will be deemed insufficient to avoid a confrontation violation if, despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the coparticipant designated in the confession by symbol or neutral pronoun." (*Id*. at p. 456.) The Court, however, distinguished such a situation from the rule annunciated in *Richardson* that admission of a codefendant's confession at a joint trial only violates the codefendant's rights under the Confrontation Clause where the redacted confession is not only "powerfully incriminating" but also "facially incriminating" of the nondeclarant defendant. (*Id*. at p. 455; see also *People v. Garcia* (2008) 168 Cal.App.4th 261, 281–282.) A rule of "contextual implication" raising constitutional confrontation issues arises only when internal reference in the statement, taken with other evidence, would result in a situation "where any reasonable juror must inevitably perceive that the defendant on trial is the person designated by a

pronoun or neutral term in the codefendant's confession." (*Fletcher, supra,* 13 Cal.4th at pp. 466, 468.) The redaction of Ray III's statement here created no such issue.

Ray Jr. also contends that admission of Ray III's statement was erroneous under *Crawford, supra,* 541 U.S. 36. In *Crawford* the Supreme Court held that admission of testimonial hearsay statements against a defendant violates the Sixth Amendment confrontation clause when the declarant is not subject to cross-examination. (*Id.* at pp. 53–54.) Testimonial hearsay includes statements taken in police interrogations. (*Id.* at p. 52.) Nonetheless, admission of such statements violates a defendant's confrontation rights only to the extent they are admitted "against" him. The redacted statement contained no evidence against defendant and thus cannot implicate the confrontation clause. "The same redaction that 'prevents *Bruton* error also serves to prevent *Crawford* error.' [Citation.]" (*People v. Stevens* (2007) 41 Cal.4th 182, 199.)

E. Admissibility of Ray III's Statements

Ray III challenges the admissibility of his statements to police, contending that the trial court erred in denying his motion in limine to exclude them. He alleges that his statements to the investigating officers were involuntary and obtained in violation of his Fifth Amendment rights under *Miranda.*[24]

When a defendant challenges his or her statements as involuntary, the prosecution bears the burden of proving voluntariness by a preponderance of the evidence. (*Lego v. Twomey* (1972) 404 U.S. 477, 489; *People v. Guerra* (2006) 37 Cal.4th 1067, 1093 (*Guerra*), disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) "[W]e review independently the trial court's legal determinations of whether a defendant's statements were voluntary [citation] . . . . We evaluate the trial court's factual findings regarding the circumstances surrounding the defendant's statements and waivers, and ' "accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence." ' [Citations.]" (*People v. Rundle, supra,* 43 Cal.4th at p. 115, disapproved on another ground in *People v.*

[24] *Miranda v. Arizona* (1966) 384 U.S. 436.

Doolin, supra, 45 Cal.4th at p. 421, fn. 22.) "We make the same inquiry to determine the voluntariness of a *Miranda* waiver. (*Colorado v. Connelly* (1986) 479 U.S. 157, 169–170 [parenthetical omitted].)" (*Guerra, supra,* 37 Cal.4th at p. 1093.)

A statement is involuntary if it is "not ' "the product of a rational intellect and a free will." ' [Citations.]" (*Mincey v. Arizona* (1978) 437 U.S. 385, 398.) "The due process [voluntariness] test takes into consideration 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.' " (*Dickerson v. United States* (2000) 530 U.S. 428, 434 (*Dickerson*) [quoting *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226].)

Ray III contends that his statements were involuntary because investigating officers ignored his request for counsel and his initial refusal to speak with them, and that he agreed to speak only when the officers threatened that his youngest sister would be sent to Child Protective Services if he did not. The trial court found the statements to be voluntary, as do we.

The trial court held an evidentiary hearing on Ray III's motion on January 23 and January 24, 2007.[25] Oakland Police Department Sergeant George Phillips testified about the circumstances of Ray III's interrogation. Ray III was arrested on August 27, 2006, at about 2:30 a.m., and was taken to the police department at about 4:00 a.m., after being treated at the hospital for facial abrasions suffered during his arrest. The interview, at which Oakland Police Sergeant Basa and Alameda Police Sergeant Owyang were also present, commenced at about 7:07 p.m. and concluded at approximately 9:05 p.m.

On the initial issue of compliance with *Miranda* requirements, Phillips testified that he read Ray III his *Miranda* rights at 7:16 p.m., using a preprinted form. Ray III initialed and dated the form, confirming his willingness to waive counsel and speak with the investigators. The officers began the recorded portion of the interview at 7:54 p.m. Phillips again advised Ray III of his rights under *Miranda*. Ray III confirmed the earlier admonition and again waived his right to counsel, signing the statement form.

[25] Ray Jr. also sought to suppress his statement to police. He testified at trial and does not raise denial of his motion as an issue in this appeal.

Testifying on his own behalf, Ray III claimed that he initially asked Phillips if he could talk to a lawyer, and that Phillips told him that he "didn't need one, it was just an interview." Phillips unequivocally denied that this occurred. The trial court found Ray III's testimony unpersuasive and accepted the officer's testimony, finding "nothing wrong with those admonitions or the waivers entered on those admonitions." Ray III argues here that the officer's testimony was not credible, suggesting the fact that there were discussions between him and the investigating officers preceding the recording of his statements renders the officer's testimony inherently suspect. He ignores the fact that it is the trial court, which had the opportunity to observe both witnesses and to listen to the recording of the interview, that makes such credibility findings. (See *People v. Rundle*, *supra*, 43 Cal.4th at p. 115.)

On the broader issue of voluntariness, Ray III insists that the totality of circumstances reflect that he was "psychologically coerced" into making incriminating statements. He points to his confinement in a police interview room for several hours before the interview commenced, his evident fatigue toward the end of the interview, alleged police deception in falsely telling Ray III that the officers had already interviewed Ray Jr., and purportedly telling Ray III that his mother and youngest sister were in police custody. He further emphasizes his young age, limited education, and minimal prior contacts with the criminal justice system.

Phillips testified that Ray III was not agitated, was cooperative and conversational throughout the interview, and began to "fatigue somewhat" only toward the end of the session. Ray III testified only that he was "tired a little bit." A log, reflecting appellant's activities and condition while waiting in the interview room, was introduced in evidence. It indicated that police personnel checked on appellant's condition about every half-hour, that he slept, was given bathroom breaks, and was given food and water. When asked at the hearing if he was feeling any effects from his injury following the police chase during his interview, Ray III's only complaint was that "My face was kind of numb . . . ." A photograph of Ray III, taken two days later, showed the condition of his face at that time.

Phillips testified that, while he could observe scratches on appellant's face, Ray III never complained of pain.

As noted above, Ray III testified that Basa told him that his mother was in custody, and that his sister would be sent to "child protective custody" unless he agreed to give a statement. Phillips expressly denied that this occurred. He testified that no promises and no threats were made to Ray III.

The court in making a voluntariness determination "examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession. [Citation.]" (*Dickerson*, *supra*, 530 U.S. at p. 434.) The question of whether the authorities improperly coerced a defendant's statements involves an evaluation of the totality of the circumstances, including the nature of the interrogation and the circumstances relating to the particular defendant. (*Ibid.*)

In finding appellant's statements to have been given voluntarily, the court found that "[t]o the question of under the Sixth Amendment as to Mr. Ray, III, as to whether or not his will was overborne by any improper behavior or threat or benefit pursuant to his testimony. I'll find that within the meaning of the federal authorities his will was not overborne as evidenced by the taped statement that he did give which shows that he admitted some things and did not admit to other things. In other words, he was able to make rational choices and appeared to answer each and every question asked of him rationally so the motion to suppress statements as to Mr. Ray, III is denied."

A finding of involuntariness must be predicated on coercive police activity. (*Colorado v. Connelly*, *supra*, 479 U.S. at pp. 169–170; *People v. Maury*, *supra*, 30 Cal.4th at p. 404.) Such coercion may take the form of physical violence, verbal threats, direct or implied promises of leniency or other rewards, or any other improper influence. (*People v. Benson* (1990) 52 Cal.3d 754, 778.) The fundamental question is whether the coercive activity proximately caused defendant's will to be overborne. (*People v. Jones* (1998) 17 Cal.4th 279, 296.)

Appellant also contends that his statement was the product of deception by police in falsely claiming that Ray III's father, Ray Jr., had been interrogated before Ray III.

Although false statements made by the police during questioning may affect the voluntariness of a defendant's confession, they are not per se sufficient to make it involuntary. (*People v. Farnam* (2002) 28 Cal.4th 107, 182.) "A finding of involuntariness is unwarranted if the deception is not of a type reasonably likely to produce a false statement." (*Guerra, supra,* 37 Cal.4th at p. 1097 [citing *Farnam,* at p. 182].) No claim was made by the officers that Ray Jr. had in any way implicated Ray III, and simply claiming that a statement had been taken from the father is not a deception of "a type reasonably likely to produce a false statement."

We likewise find that the totality of circumstances does not reflect impermissibly coercive police activity, the statements given by appellant were voluntary and the motion was properly denied.

F. Ray III's Claim of Ineffective Assistance of Counsel

Ray III argues that his trial counsel was ineffective because he failed to present an adequate argument for exclusion of his statements, and that he failed to "gather or present crucial evidence" on the *Miranda* and voluntariness issues. He contends that there is a reasonable probability that he would have obtained a more favorable result had counsel's performance not been deficient.

The standard of review for an ineffective assistance of counsel claim is well settled. A criminal defendant has a federal and state constitutional right to the effective assistance of counsel. To establish a claim of incompetence of counsel, a defendant must establish both that counsel's representation fell below an objective standard of reasonableness and that it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686–688, 694–695 (*Strickland*); *People v. Benavides* (2005) 35 Cal.4th 69, 92–93; *People v. Ledesma* (1987) 43 Cal.3d 171, 215–218.) Generally, prejudice must be affirmatively proved. (*Strickland*, *supra*, at p. 693.) To prevail, a defendant must establish incompetence of counsel by a preponderance of evidence. (*People v. Ledesma, supra,* 43 Cal.3d at p. 218.) As an ineffective assistance of counsel claim fails on an insufficient showing of either element, a court need not decide the issue of counsel's

alleged deficiencies before deciding if prejudice occurred. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126, cert. den. *sub nom. Rodrigues v. California* (1995) 516 U.S. 851.)

Judicial scrutiny of counsel's performance must be highly deferential. (*Strickland, supra,* 466 U.S. at p.689.) There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (*Id*. at p. 690.) Appellant fails to suggest what "crucial" evidence that trial counsel failed to gather or present on these issues, and therefore fails to establish deficient performance by counsel in this respect. He likewise fails to suggest what different arguments trial counsel should have made in support of the motion to suppress. On this latter point, our rejection of his arguments on the *Miranda* and voluntariness issues, as discussed above, is dispositive, since as a consequence he cannot demonstrate prejudice.

G. Impeachment of Ray Jr.'s Trial Testimony

Ray Jr. complains that he was denied a fair trial when the court allowed the prosecution to cross-examine him on what he contends is unrelated misconduct. As he acknowledges, we review any ruling by the trial court on the admissibility of evidence for abuse of discretion. (*Guerra, supra*, 37 Cal.4th at p. 1113.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*Ibid*. [citing *People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10].) "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*Partida, supra,* 37 Cal.4th at p. 439 [citing *People v. Watson* (1956) 46 Cal.2d 818, 836].)

In appellant's trial testimony, Ray Jr. sought to portray Carrington, who had testified against him, as a dangerous individual who "had [his] kids smoking drugs and stuff like that . . . ," who was physically abusive to Melissa Ray, and whom he feared. The prosecutor cross-examined appellant about his drug use, including drug use in front

of, and with, his children, and about assaultive conduct by Ray Jr. on his children, his wife, and other persons. The cross-examination on the assaultive conduct followed Ray Jr.'s insistence, while denying committing the robberies, that "I'm a law abiding citizen. I have no prior offenses. I'm 40 years old and all of a sudden, I went crazy, and committed 80 robberies. I've never been convicted for any drug offense or anything. I had a minor alcohol problem which I have canned by taking classes. Other than that, I don't have a record." He also insisted that "I'm not a violent person."

Appellant argues here that the cross-examination was irrelevant and further that much of it should have been excluded under Evidence Code section 352, on the basis that the prejudicial effect outweighed any probative value. The latter ground is forfeited in this appeal by lack of any objection on this basis in the trial court. A defendant may not argue on appeal that the court should have excluded the evidence for a reason not asserted at trial. (*Partida*, *supra*, 37 Cal.4th at p. 431; see Evid. Code, § 353, subd. (a).)[26] To the extent Ray Jr. seeks to assert a different theory on appeal for exclusion than he asserted at trial, that assertion is not cognizable. (*Ibid*.) Further, the majority of the relevance objections appellant raises here are likewise forfeited for failure to object at all.

Counsel objected to questions regarding appellant's possible sexual intimacy with a friend of his daughter's on the grounds of relevance, and that it exceeded the scope of the direct examination. Although the objection was overruled, the prosecutor asked no further questions on this subject. No motion was made to strike the testimony. His only other relevance objection on issues of assaultive conduct was made in response to a prosecution questioning about appellant's arrest in Pennsylvania for an assault on a man with a baseball bat. Appellant responded that he did not use a baseball bat, that a

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[26] "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353.)

codefendant did, and that he was charged only with public drunkenness and disorderly conduct.

The questioning regarding the assaultive conduct followed appellant's testimony that he was a "law abiding citizen" who had "never broken a law, more than a minor . . . traffic infraction," and was relevant to impeachment of that claim. We would agree that the questioning regarding appellant's sexual intimacy with an 18-year-old friend of his daughter had no readily apparent relevance to any issue raised by appellant's direct testimony. However, the prosecution did not pursue this area further once objection was made, and did not mention in it in her closing argument. To the extent that it was error to overrule appellant's objection, there has been no showing made that it resulted in fundamental unfairness, and it is not reasonably probable the verdict would have been more favorable to the defendant absent the error. (*People v. Watson* (2008) 43 Cal.4th 652, 686; *Partida*, *supra*, 37 Cal.4th at pp. 432, 439.)

H. Sufficiency of the Evidence as to Ray Jr.

Ray Jr. contends that the evidence is insufficient to sustain his convictions on counts 2, 3, 8, 9, 15, 18, 19, 20, 22, and 25. These counts arise from seven of the robbery incidents: the robberies of Allen Kung and Christina Miller at Longs Drugs in Oakland on July 12, 2005 (counts 2 & 3); the robberies of Frezghi Tesfamicheal and Darshan Singh the 7-Eleven store on 41st and Broadway, Oakland on April 24, 2006 (counts 8 & 9); the robbery of Jose Hernandez at Round Table Pizza in Alameda on May 28, 2006 (count 15); the robberies of Seara Tesfamariam and Yash Hampaul at the 7-Eleven at 41st and Broadway, Oakland on June 30, 2006 (counts 18 & 19); the robbery of Joseph Adkins at Walgreens Drugstore in Alameda (count 20); the robbery of Francis Shelley at 7-Eleven store on 23rd Avenue, Oakland on July 10, 2006 (count 22); and the robbery of Issa Abdul-Kareem at the 7-Eleven store at 4720 MacArthur, Oakland on August 1, 2006 (count 25). As to the contested counts, there was no direct evidence of appellant's identity as one of the robbers, and his guilt was established, if at all, circumstantially.

Appellant implicitly acknowledges that the evidence was sufficient to establish his guilt with respect to eight other robbery incidents of which he was convicted[27] (counts 5 & 6—robberies of Sandeep Kumar and Kuldip Sekhon at the 7-Eleven store on Harrison Street, Oakland on Apr. 18, 2006; count 11—robbery of Sandeep Kumar at the 7-Eleven store on Harrison Street, Oakland on Apr. 29, 2006; count 12—robbery of Nickolas Becker at Walgreens at 34th Street and Telegraph Avenue, Oakland on May 13, 2006; count 14—robbery of Melisew Ayenew at the 7-Eleven store at 41st and Broadway, Oakland on May 25, 2006; counts 16 and 17—robberies of Yong Kim and Stephen MacManus at South Shore Liquor Store, Alameda on June 23, 2006; count 23—robbery of Andy Truong at the AM/PM Market on Park Street, Alameda on July 18, 2006; and counts 26 & 27—robberies of Alan Rodrigues and Annica Henderson at the 7-Eleven store at Aldengate Way, Hayward on Aug. 8, 2006).

In reviewing appellant's challenges to the sufficiency of the evidence, "we do not determine the facts ourselves." (*Guerra, supra,* 37 Cal.4th at p. 1129.) Instead, our task is to " 'examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*Ibid*.) Thus, " '[t]he test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. [Citation omitted.] The appellate court must determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.' " (*People v. Johnson, supra,* 26 Cal.3d at p. 576.) The standard of review is the same in cases in which the People rely primarily on circumstantial evidence. (*Guerra, supra,* 37 Cal.4th at p. 1129; *People v. Bean* (1988) 46 Cal.3d 919, 932.) An appellate court

[27] We refer to these as "uncontested" counts not because appellant in any way acknowledges his guilt of these charges, but because he does not contest the sufficiency of the evidence to sustain his convictions for these crimes. We discuss separately count 1, the offense for which Ray Jr. was originally arrested and to which he confessed.

must accept logical inferences that the jury might have drawn from the circumstantial evidence. (*People v. Rodriguez, supra,* 20 Cal.4th at p. 11.) If we determine that a rational jury could find the essential elements of the crime proven beyond a reasonable doubt, this satisfies the due process clauses of both the federal and California Constitutions. (*People v. Memro* (1995) 11 Cal.4th 786, 861.)

In conducting our review, we must bear in mind that it is the jury's role "to determine the credibility of . . . witness[es] and the truth or falsity of the facts upon which a determination depends. [Citation.]" (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) We may not substitute our judgment for that of the jury, and if the evidence reasonably supports the jury's findings, we may not reverse the judgment merely because we believe that the evidence might also support a contrary finding. (See *People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Bean, supra,* 46 Cal.3d at pp. 932–933.)

Since the evidence presented was received without limitation, the jury could consider all the evidence produced at trial in deciding whether a charged offense had been proven beyond a reasonable doubt. The question is whether the totality of the evidence here circumstantially established Ray Jr.'s identity as one of the robbers in the seven contested incidents. We find that it did.

1. Evidence on the Contested Offenses

In contested counts 2 and 3, the robbery of the Longs Drugs store on July 12, 2005, was committed by three individuals. One tall White male was identified as Ray III by his own admission. A shorter robber was a male dressed in black and wearing a mask and gloves. The robbers were familiar with the "Reno Box" into which cashiers

deposited large denomination currency. Melissa Ray worked as a cashier at the store. The incident was captured on surveillance video.[28]

In counts 8 and 9, one of two robbers was described as about five feet seven inches tall, and was wearing a black hooded sweatshirt with his lower face covered when he entered the 7-Eleven store at 41st and Broadway on April 24, 2006 with a gun and demanded that the victims open the cash register. They arrived in a small silver car. Cash and cigarettes were taken. Ray III admitted to robbing this store on multiple occasions and was inferentially the taller of the two robbers caught on the surveillance video.

In count 15, two men entered the patio area of a Round Table Pizza trailer in Alameda on May 28, 2006, wearing dark clothing with hoods on their heads, and blue and red bandanas covering their lower faces. Ray III admitted this offense and was inferentially the taller and thinner of the two men. The second man was described as between five feet eight inches and five feet ten inches tall.

In counts 18 and 19, the 7-Eleven store at 41st and Broadway was again robbed on June 30, 2006, by two men wearing black coats and ski masks. The robbers took cash, lottery tickets, and cigarettes. One gunman was described as taller than one of the victims, who was about five feet five inches tall, and the second gunman was taller than the first. Surveillance video of the robbery was again shown to the jury. As noted, Ray III admitted multiple robberies at this location. A stolen Honda Civic was found abandoned about five minutes away in the 2800 block of Webster Street, with the steering column and right rear window broken.

In count 20, two White or Hispanic men entered the Walgreens in the South Shore Shopping Center in Alameda on July 6, 2006, wearing black hooded sweatshirts, with handkerchiefs covering their lower faces. The shorter of the two men carried a shotgun and was wearing army camouflage pants. Cash and cigarettes were taken. A stolen Honda Civic was found about 300 yards from the store with a tampered ignition and the

[28] The videos, and the still photographs taken from the videos, are not part of the record before us.

engine running. Ray III admitted this robbery, and was identified by Carrington from the surveillance video.

In count 22, another 7-Eleven store on 23rd Avenue in Oakland, was robbed on July 10, 2006, by two men, one of whom was about six feet tall and thin. The men wore dark clothing, with wrap-around sunglasses and handkerchiefs covering their lower faces. The shorter of the two men carried a shotgun and was shorter than one of the victims, who is slightly over five feet nine inches tall. Witnesses were unsure of the race of the two men. The robbery was recorded on surveillance video. The robbers fled in a stolen red Honda which was located by police in the vicinity. Ray III admitted robbing this store.

In count 25, the 7-Eleven store at 4720 MacArthur Boulevard in Oakland was robbed on August 1, 2006 by two masked White men. One man had a gun and the other a knife. They were described as having talked to each other during the robbery "like family." The robbers took cash and beer and fled in a newer Honda Civic, which was located by police about a block away with the motor running and the driver's door open. This robbery also was captured on surveillance video, and Ray III admitted his participation.

2. Evidence on the Uncontested Offenses

As to the counts on which appellant concedes the sufficiency of the evidence, in counts 5 and 6, a robbery of a 7-Eleven store on Harrison Street in Oakland on April 18, 2006, the two robbers captured on the surveillance video wore dark sweatshirts with their lower faces covered. One was shorter, about five feet seven inches tall. They arrived in a silver colored Honda and took the cash drawer, lottery tickets, and cigarettes. Ray III admitted this robbery, and Carrington identified Ray Jr. as the man with a gun shown on the video.

Count 11 relates to a second robbery of the Harrison Street 7-Eleven store, again by two men wearing sweatshirts with hoods and cloths covering their lower faces, and again taking money and cigarettes. Ray III also admitted this robbery, and Carrington

identified Ray III as the taller of the two men shown on the surveillance video and Ray Jr. as the shorter.

In count 12, a robbery of a Walgreens at 34th and Telegraph in Oakland on May 13, 2006, the two robbers entered the store after arriving in a grey Toyota or Honda. The taller gunman wore a black hooded sweatshirt with a red bandana covering his face. They took the cash drawer and cigarettes. Carrington identified both Ray III and Ray Jr. from the surveillance tape.

Count 14 results from another of the robberies of the 7-Eleven store at 41st and Broadway in Oakland, this one on May 25, 2006. Two men again entered, with their faces partially covered, taking money from the register and cigarettes. Ray III admitted robbing this store "two or three" times, and Carrington identified both Ray III and Ray Jr. on the surveillance tape, pointing out Ray Jr. as the individual wearing the "army pants." Camouflage pants were recovered from the Ray's RV.

In counts 16 and 17, two men wearing hoods and masks entered South Shore Liquors in Alameda on June 23, 2006. The taller man wore a black sweatshirt with a red bandana over his lower face. The shorter man wore a grey hooded sweatshirt with a blue bandana covering his face. One of the victims identified Ray Jr. in court as the robber with a shotgun, based on complexion, shape of the face, the area around his eyes, his hair color, and his height. Ray III admitted this robbery.

Count 23 was the robbery of the AM/PM Market in Alameda on July 18, 2006. Two White men and a tall Black man entered the store, with the older of the two White men carrying a shotgun. The man with the shotgun wore a hooded sweatshirt, gloves, and a red bandana covering his face. He was about five feet seven inches tall. Carrington admitted that he was the Black man on the video, and he identified Ray Jr. as the man with the shotgun. They drove to the scene in a stolen Honda. Ray III admitted this offense, and identified himself and Carrington on the tape. The prosecution argued that Ray Jr.'s voice could be identified on the video, telling the victim to "open the fucking register."

In counts 26 and 27, another 7-Eleven store, this one in Hayward, was robbed on August 8, 2006, by three masked men. Carrington testified that he had committed this robbery with Ray III and Ray Jr., going to the location in a stolen Honda. He identified Ray Jr. from the surveillance video as the person wearing a black hoodie and camouflage pants. Ray III admitted this robbery and identified both himself and Carrington from photographs taken from surveillance video.

3. Other Trial Evidence

Ray Jr. was arrested fleeing the scene of a convenience store robbery in the company of his son, and in a stolen Honda (count 1). In the course of the robbery, they grabbed the entire cash drawer, and took not only the cash, but also cigarettes. He was wearing a dark blue shirt with an Oakland Raiders logo, gloves, and used a red bandana to cover his lower face. He admitted this robbery to police, and further said that he had done "some" others. He inferentially admitted knowledge of other robberies, saying "I know who you're looking for. I read the papers. You guys have been betting on who is going to get us." The jury obviously found his testimonial denials and explanations less than credible.

There was also evidence that Ray Jr. attempted to dissuade Carrington from testifying against him, and sought to have his son falsely exculpate him. The jury could reasonable conclude that this evidenced a consciousness of guilt on his part.

4. Other Circumstantial Evidence

Evidence of commission of one offense by a defendant, while not admissible to show bad character or predisposition to criminality, may be admissible to determine a defendant's guilt of another, if relevant to prove some material fact at issue such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, other than his or her disposition to commit such an act. (Evid. Code, § 1101, subd. (b).) The identity of the perpetrators was the issue here. "Evidence going to the issue of identity must share distinctive common marks with the charged crime, marks that are sufficient to support an inference that the same person was involved in both instances." (*People v. Prince* (2007) 40 Cal.4th 1179, 1271, italics omitted; *People v.*

Gray (2005) 37 Cal.4th 168, 202.)[29] While appellant argues that the "common marks" here are not particularly distinctive when standing alone, "in the aggregate, the similarities become more meaningful, leading to the reasonable inference that [appellant] was the person who committed [the other] crimes." (*People v. Medina* (1995) 11 Cal.4th 694, 748.)

While we have assumed without deciding that not all evidence relating to each offense would have been admissible to establish identity under Evidence Code section 1101, in the absence of limitation on consideration of the evidence, there are numerous points of similarity from which a reasonable jury could circumstantially conclude that one of the people committing the contested offenses on July 12, 2005, and April 24, May 28, June 30, July 6, July 10, and August 1, 2006, was the same individual, Ray Jr. who was: identified as responsible in similar robberies, primarily of convenience stores, on April 18, April 29, May 13, May 25, June 23, July 18, and August 8, 2006; and arrested fleeing from yet another similar convenience store robbery on August 27, 2006, wearing clothing similar to that described in the contested robberies. Similar clothing (dark hooded sweatshirts, with bandanas or handkerchiefs for facial covering) was worn in nearly all of the contested and uncontested offenses, and camouflage pants worn by Ray Jr. in counts 14 (May 25, 2006 7-Eleven robbery) and counts 26 and 27 (August 8, 2006 7-Eleven robbery) are also seen on the man carrying a shotgun in the video of count 20, the July 6, 2006 robbery of Walgreens in Alameda. Nine of the fifteen incidents

[29] Appellant argues that since evidence of other criminal misconduct is so highly inflammatory, an "extremely careful analysis" and "the greatest degree of similarity" are required before such evidence is admissible. (See *People v. Lewis, supra*, 25 Cal.4th at p. 637 ["the probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury"].) The requirement for a high degree of similarity for admissibility is part of the calculus under Evidence Code sections 352 and 1101 when objection is made to evidence of uncharged criminal conduct, but here the evidence was received without objection and was properly before the jury on joined charged offenses. Again, we need not decide what evidence might have been admissible had the trial court been asked to make the analysis Ray Jr. now asks us to undertake, and an appropriate limiting instruction requested.

charged here involved robberies of 7-Eleven stores. Ray Jr. was identified as one of the robbers in one of the robberies at the 7-Eleven store at 41st and Broadway on May 25, 2006 (count 14), and the same store was robbed by two similarly described men, in the same fashion, on April 24, 2006 (counts 8 & 9), and on June 30, 2006 (counts 18 & 19). The stolen Hondas regularly used in the robberies, as confirmed by Carrington's testimony and Ray III's statements to police, were observed or found in the vicinity on counts 18 and 19, and counts 20 and 22. Ray Jr. regularly committed robberies with his son, as shown in the videos of the uncontested charges, and Ray III admitted his participation in the contested counts.

We find that the evidence was sufficient, in the aggregate, to permit the jury to draw the inference of appellant's guilt on each of the charges against him.

III. DISPOSITION

The judgments as to both appellants are affirmed.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Simons, J.